Filed 11/9/09 P. v. Herring CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

THE PEOPLE, Plaintiff and Respondent, v. ANDREW DECARLOS HERRING, JR., Defendant and Appellant.	C061296 (Super. Ct. No. 62075849A)

The trial court found defendant Andrew DeCarlos Herring, Jr., guilty of four counts of second degree burglary of a vehicle (Pen. Code, § 459 (undesignated statutory references are to this code)--counts 1, 6, 10, & 14) and three counts of petty theft with a prior (§§ 484 & 666 -- counts 2, 7 & 15). Defendant admitted two strike priors (§§ 667, subds. (b)-(i)) and having served one prior prison term allegation (§ 667.5, subd. (b)). The court denied defendant's motion to strike one of the "strike" priors and sentenced him to an indeterminate term of 25 years to life on count one; he received the same

sentence, stayed pursuant to section 654, on counts 2, 7 and 15; and he was sentenced to concurrent terms of 25 years to life on counts 6, 10 and 14 and one year for the prior prison term.

On appeal, defendant contends the 25-years-to-life sentences for petty theft with priors and second degree burglary violate the ban against cruel and/or unusual punishment under the United States and California Constitutions. Defendant also contends he was denied his right to effective assistance of counsel. We will affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY[1]

On December 12, 2007, at approximately 4:30 a.m., City of Roseville police officers responded to a report of vehicle burglaries. While driving through a parking lot in the vicinity of the reported burglaries, Officer John Helliwell saw a "large speaker box" in the back seat of a gray Mercedes Benz and defendant lying on the front seat.

Officer Helliwell ordered defendant to get out of the car. Dressed in all dark clothing, defendant admitted driving the Mercedes to that parking lot. Officer Helliwell then searched the car and found a cell phone, gloves, cutting pliers, several car stereos, other audio equipment, and items of personal property.

---

[1] Pursuant to the parties' agreement, the trial was conducted based on the transcript from the preliminary hearing and limited additional testimony.

Meanwhile, in a nearby parking lot, Officer Ryan Nottleson saw codefendant Marshall Keith McMurray, Jr., trying to open the door of an Oldsmobile. McMurray was wearing "a hooded sweatshirt" and gloves, and was carrying a cell phone from which light was emanating. Nottleson stopped McMurray and searched him, finding four screwdrivers, wire cutters, and a "window punch." He also found glass fragments consistent with vehicle safety glass in the front pocket of McMurray's sweatshirt. Nottleson then dialed the last number called on McMurray's cell phone; the call went through to defendant's phone, which was found in the Mercedes, along with defendant.

While investigating the burglaries, police officers spoke with the owners of 10 vehicles, all of whom reported having their vehicles broken into, many of whom also reported having items stolen from inside their vehicles, most of which were found in defendant's trunk.

Defendant and McMurray were arrested and defendant was charged with 10 counts of second degree burglary of a vehicle (§ 459 -- counts 1, 3, 4, 6, 8, 9, 10, 12, 14 & 18), seven counts of petty theft with priors (§§ 484, 666 -- counts 2, 5, 7, 13, 15, 16 & 19), and a single count of grand theft (§ 487, subd. (a)-- count 11). It was further alleged that defendant had five prior strike convictions and served one prior prison term. Defendant waived his right to a jury and proceeded to a court trial.

The court found defendant guilty on four counts of second degree burglary of a vehicle (counts 1, 6, 10 & 14) and three

counts of petty theft with priors (counts 2, 7 & 15), and not guilty on the remaining charges. Defendant admitted having two prior strike convictions and serving one prior prison term.

The trial court later denied defendant's motion to strike one or both of his prior strike convictions. Defendant was then sentenced to 25 years to life on count 1, plus one year for his prior prison term. The court imposed concurrent sentences of 25 years to life on counts 6, 10 and 14, and 25 years to life on counts 2, 7 and 15, which were stayed pursuant to section 654. Defendant was given 662 days of presentence credit pursuant to section 4019, and ordered to pay various fines and fees.

Defendant appeals his sentence.

DISCUSSION

I

Cruel and/or Unusual Punishment

Defendant contends his sentence of 26 years to life violated his federal and state constitutional guarantees against cruel and/or unusual punishment. He argues his failure to raise his constitutional claims below does not preclude us from considering them on appeal, and argues further that any failure to raise the claims was the result of ineffective assistance of counsel. Respondent argues the claims were indeed forfeited by defendant's failure to raise them and, in any event, the claims lack merit.

Assuming defendant's contentions are not forfeited for failure to raise them in the trial court (see *People v. Williams* (1998) 17 Cal.4th 148, 161-162, fn. 6; *People v. Saunders* (1993)

5 Cal.4th 580, 589, fn. 5; but see *People v. Norman* (2003) 109 Cal.App.4th 221, 229; *People v. DeJesus* (1995) 38 Cal.App.4th 1, 27), they fail on the merits.

Under the proscription of "cruel and unusual punishment" in the Eighth Amendment to the United States Constitution (applicable to the states via the Fourteenth Amendment), a "'narrow proportionality principle' . . . 'applies to noncapital sentences.'" (*Ewing v. California* (2003) 538 U.S. 11, 20 [155 L.Ed.2d 108, 117] (*Ewing*), quoting *Harmelin v. Michigan* (1991) 501 U.S. 957, 996-997 [115 L.Ed.2d 836, 865-866] (*Harmelin*)(conc.opn. of Kennedy, J.).) This constitutional principle "'forbids only extreme sentences that are "grossly disproportionate" to the crime.'" (*Ewing*, *supra*, 538 U.S. at p. 23 [155 L.Ed.2d at p. 119], quoting *Harmelin*, *supra*, 501 U.S. at p. 1001 [155 L.Ed.2d at p. 869](conc. opn. of Kennedy, J.).)

Objective factors guiding the proportionality analysis include "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for the commission of the same crime in other jurisdictions." (*Solem v. Helm* (1983) 463 U.S. 277, 292 [77 L.Ed.2d 637, 650].) But only in the rare case where the first factor is satisfied does a reviewing court consider the other two factors. (*Harmelin*, *supra*, 501 U.S. at p. 1005 [115 L.Ed.2d at pp. 871-872] (conc. opn. of Kennedy, J.).)

The United States Supreme Court rejected an Eighth Amendment challenge to a 25-years-to-life "Three Strikes"

sentence in *Ewing*, *supra*, 538 U.S. 11 [155 L.Ed.2d 108], noting that recidivism has traditionally been recognized as a proper ground for increased punishment. (*Id.* at p. 25 [155 L.Ed.2d at p. 120].) Given the defendant's long criminal history, the court held that the defendant's punishment was not disproportionate despite the relatively minor character of his current felony. (*Id.* at p. 29 [155 L.Ed.2d at p. 122].)

Here, defendant's criminality began in 1991 with a conviction for resisting a peace officer (§ 148, subd. (a)), for which he served 10 days in jail. Three years later, defendant was convicted of carrying a loaded firearm in a public place (§ 12031, subd. (a)) and sentenced to three years of probation. That same year, defendant was convicted of possessing cocaine base for the purpose of sale (Health & Saf. Code, § 11351.5), and was sentenced to five years of probation.

Then, in 1996, while on probation, defendant committed numerous criminal acts, leading to his conviction on three counts of first degree robbery (§ 211), two counts of assault with a deadly weapon by means of force likely to produce great bodily injury (§ 245, subd. (a)(1)), and one count of sexual battery (§ 243.4). As a result of these convictions, defendant was sentenced to 14 years in state prison. Paroled on May 15, 2004, defendant successfully completed three years of parole without incident and was discharged on May 15, 2007. But only seven months after being discharged, defendant committed the crimes for which he was convicted here.

Defendant claims that, because he committed the current crimes without violence, and because petty theft with a prior and second degree auto burglary can be treated as either a felony or a misdemeanor, the punishment is grossly disproportionate to the crime. He urges us to reach the same conclusion as that in *People v. Carmony* (2005) 127 Cal.App.4th 1066 (*Carmony*). In *Carmony*, the defendant failed to register as a sex offender within five days of his birthday, thus violating section 290, for which the defendant received a state prison sentence of 26 years to life. (*Id.* at p. 1074.) We reversed, finding that, under the circumstances of the case, the sentence constituted cruel and unusual punishment because the "offense was an entirely passive, harmless, and technical violation of the registration law . . . ." (*Id.* at p. 1077.) Such is not the case here.

Defendant's history of criminality extends back to when he was only 19 years old. In 1996, when defendant was 24, he and his friends broke into a motel room, where defendant used a can of hairspray as a makeshift blowtorch in order to "singe" the body parts of a couple that he and his cohorts had "ordered to disrobe and perform sexual acts." Defendant and his cohorts then robbed the couple of $300 before leaving the motel room.

That same night, defendant and his cohorts overpowered a woman in the laundry room of her apartment complex, took her key, and followed her back to her apartment. In her apartment, the men threatened the victim with a gun, and before fleeing, one of the men fired shots at the victim, grazing her head with

a bullet. Defendant attempts to minimize these offenses by claiming they were an aberration, occurring on a single night, but the heinous and violent nature of these crimes cannot be minimized.

Defendant's current offenses further demonstrate his disregard for the law and public safety. Only seven months after being outside the reach of the California Department of Corrections and Rehabilitation for the first time in 14 years, defendant, in a single evening, broke into four vehicles in order to steal electronic equipment from inside. Given his prior record, the violent nature of his prior crimes, and his unwillingness to live within the confines of the law, defendant's sentence is not grossly disproportionate. (See *People v. Romero* (2002) 99 Cal.App.4th 1418, 1424 [25 years to life, under recidivist statute, for felony petty theft with priors does not constitute cruel and unusual punishment].)

Similarly, article I, section 17 of the California Constitution proscribes "cruel or unusual punishment." Although this language is construed separately from the federal constitutional ban on "cruel and unusual punishment" (*Carmony*, supra, 127 Cal.App.4th at p. 1085), the method of analysis is similar: the reviewing court considers "the nature of the offense and/or the offender, with particular regard to the degree of danger both present to society"; the comparison of "the challenged penalty with the punishments prescribed in the same jurisdiction for different offenses"; and the comparison of "the challenged penalty with the punishments prescribed for the

same offense in other jurisdictions . . . ." (*In re Lynch* (1972) 8 Cal.3d 410, 425-427, italics omitted.) The purpose of this analysis is to determine whether the punishment is "so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*Id.* at p. 424, fn. omitted.)

We do not find that this is one of those rare cases where the sentence is so disproportionately harsh as to shock the conscience or to offend fundamental notions of human dignity. (See *People v. Kinsey* (1995) 40 Cal.App.4th 1621, 1631.) As previously discussed in this opinion, defendant's past offenses are grave. His ongoing disregard for the law and refusal to accept the gravity of his crimes serves only to exacerbate the crimes. His punishment is not disproportionate to that inflicted on other recidivists under the Three Strikes law.

Quoting extensively from P*eople v. Martinez* (1999) 71 Cal.App.4th 1502, defendant cites the sentencing guidelines from other states in support of his argument that when the third felony is "nonviolent," a sentence of 25-years-to-life is "constitutionally proscribed and excessive . . . ." Defendant's argument is unpersuasive. Defendant received a 14-year state prison sentence after being convicted of committing violent offenses. Yet, within seven months of being discharged from parole, following completion of a lengthy prison sentence, defendant committed the numerous burglaries and theft crimes for which he was convicted here. Such conduct demonstrates that defendant has little interest in abiding by the law. In any

event, the interjurisdictional test does not require proof that California's sentencing scheme as to recidivists is less harsh than others. (*Martinez*, *supra*, 71 Cal.App.4th at p. 1516.)

Defendant has not shown that his punishment was "cruel and unusual" under the federal Constitution, or "cruel or unusual" under the California Constitution.

II

Ineffective Assistance of Counsel

Defendant contends the failure to object to his sentence as cruel and/or unusual was the fault of his ineffective trial counsel. Because we addressed the merits of defendant's constitutional claims despite his failure to raise them below, we need not address his claim of ineffective assistance of counsel.

DISPOSITION

The judgment is affirmed.

BLEASE, Acting P. J.

We concur:

ROBIE, J.

CANTIL-SAKAUYE, J.